the social considerations which make it contrary to public policy to insist on the maintenance of the union which has utterly broken down. I am satisfied that in this case the marriage has completely and utterly broken down. It is open to this court to refuse to exercise its discretion in favour of either party whereupon both petitions will stand dismissed and the marriage remain unresolved, but I do not propose to adopt that course because I am satisfied that there is no prospect whatsoever of reconciliation between the spouses. With the case of *Anstey* v. *Anstey and Hartford* [8] very much in mind, I exercise my discretion on the case as a whole and pronounce a decree nisi to be made absolute in three months on the petition on the ground of cruelty and also on the cross-petition on the same ground. Each party to bear his or her own costs. Parties to have liberty to apply.

Decrees nisi granted.

Solicitors: *Braddell & Ramani; Chung & Huang.*

SIAH v. TENGKU NONG

[F.C. (Barakbah C.J., Azmi & Suffian JJ.) October 8, 1963]

[Kuala Trengganu — Federal Court Civil Appeal No. 2 of 1963]

Contract—Agreement to transfer future interest in land—Admission of oral evidence to establish transaction was loan and charge—Whether transaction a sale—Whether agreement enforceable—Defence of fraud—Defence not heard—Whether specific performance should be ordered.

In 1957 Tengku Nong now deceased received a sum of $1,000 from the plaintiff and by an agreement in writing she agreed to transfer to the plaintiff an acre of land of which she was not the proprietor but to which she was entitled in conjunction with others on the distribution of the estate of her late father.

On a claim by the plaintiff for specific performance of the agreement her administrator admitted receipt of the money but contended that it was a loan, that the land had only been charged to the plaintiff and that the agreement was fraudulently executed in that it was not read over and explained to the deceased.

Held: (1) oral evidence was not admissible to show that the transaction was a loan and charge;

(2) as fraud had been pleaded and the defence had not been heard, no specific performance should be ordered.

FEDERAL COURT.

Hashim bin Abdullah for the appellant.

Maidin bin Mohamed Ibrahim for the respondent.

Suffian J. (delivering oral judgment): Tengku Nong now deceased was the daughter of the late His Highness Sultan Ahmad.

After her father's death, she received $1,000 from the plaintiff and on 11th February 1957 signed the agreement exhibit P.1, a translation of which is in the following terms:—

12th Feb. Stamp. .50 cts.
K. 86/57
(Chop Stamp Office)
Kuala Trengganu.
Sd. xxx

ACKNOWLEDGMENT OF RECEIPT OF MONEY

Executed in Town of Kuala Trengganu on 11th day of February, 1957.

I, Tengku Nong binti Al-marhom Sultan Ahmad, residing at Kampong Gong Kapas, Kuala Trengganu, during sound mind and good health and on my own accord on this day and date of executing this document, acknowledge receipt of one thousand dollars only ($1,000.00) from Siah binti Abdullah of Kampong Dalam Kota Istana Maziah, Kuala Trengganu.

2. I (Tengku Nong binti Al-marhom Sultan Ahmad), agree that as soon as the estate of my father (Al-marhom Sultan Ahmad) is distributed in the Supreme Court, Kuala Trengganu, in which I am entitled, I will execute in Land Office a transfer of (1) acre of land known as Grant No. 1986, Mukim Bukit Besar, Kuala Trengganu, and I cannot refuse or make default of same.

3. If I fail to transfer 1 acre of the said land to Siah binti Abdullah, she will be entitled to sue me in accordance with the law.

In witness whereof both parties put their hands hereunder in the presence of witnesses.

xxxx
RTP. Tengku Nong binti Al-marhom Sultan Ahmad.

yyyy
RTP. of Siah binti Abdullah
i.c. Tr. No. ....

Witnessed by: Sd: xx illegible
Sd: xyxy Tengku Wook Chik.
Petition Writer
no. 22/57 Ja'afar bin Ali,
Kuala Trengganu.

Sd: Ja'afar bin Ali.

The plaintiff asked for specific performance of this agreement. The defendant, Che Osman bin Ali, the administrator of Tengku Nong's estate, in his written defence admitted receipt of the $1,000 but contended that it was a loan, that the land now worth $12,000 to $13,000 per acre had only been charged to the plaintiff and that exhibit P.1 was fraudulently executed because it was not read over and explained to Tengku Nong.

The plaintiff gave evidence and in support called two witnesses. After she had closed her case, according to the records, "Che Maidin (for the defendant) admits that (the) $1,000 was given as a loan. Defendant knows nothing about P.1", whereupon the learned Judge without hearing any further evidence gave judgment for the plaintiff for $1,000, each party to pay its own costs.

The learned Judge dismissed the plaintiff's claim for specific performance because

(1) The agreement related to an unspecified portion of the land at present registered in the name of the various beneficiaries of Sultan Ahmad, including Tengku Nong whose registered share was admitted as 12,840,

144/57, 551, 472 (which equalled 3 acres), that share was undivided and therefore the agreement was void for uncertainty under section 30 of the Contracts (Malay States) Ordinance and

(2) The defendant himself admitted it was a loan and this admission was supported by the oral evidence of the plaintiff's 2nd witness.

The plaintiff appeals.

I agree with Inche Hashim, counsel for the appellant that the learned Judge's decision cannot be upheld.

First, the agreement relates to a specified piece of land and gives a description of it. The only thing is that it does not specify which particular acre forms the subject matter of the transaction, but I do not think that this matters, because it is perfectly lawful and commonplace to buy and sell undivided shares in land. In any event this point was never pleaded by the defendant who was represented.

Secondly, the terms of an agreement having been proved by its production, normally no oral evidence such as that given by the plaintiff's second witness may be admitted to vary or contradict them except where fraud is alleged, as here. That the learned Judge found as a fact that the transaction was a loan shows that in his view fraud on the plaintiff's part the burden of proving which lies on the defendant, has been proved; but remembering the degree of proof that is required to establish fraud it is clear that no court can reasonably hold on the evidence so far disclosed in this case that fraud has been established.

The only question remaining is what order should be made in this appeal.

Should it be held that the transaction was a sale and specific performance ordered of P.1? Such a conclusion would be tantamount to a finding that no fraud has been practised by the plaintiff on Tengku Nong.

Che Maidin submits that owing to the course taken by the learned Judge after the conclusion of the plaintiff's case, when the learned Judge proceeded to give judgment without asking if the defendant wished to give or call evidence, the defendant was deprived of the opportunity of proving fraud by the plaintiff. It is true that if it is held that the transaction was a sale and specific performance ordered of P.1. it would be unfair to the defendant because if allowed an opportunity of giving or calling evidence he might well prove fraud in which event he would have to part only with $1,000, and not with the acre sold.

Considering this case as a whole I think that the most satisfactory course is to order a retrial before another Judge.

Costs to abide the event.

Barakbah C.J. and Azmi J. concurred.

Retrial ordered.

HO CHOON CHEE v. LEONG YEE SIN

[O.C.J. (Gill J.) December 3, 1963]

[K.L. — Civil Suit No. 680 of 1963]

Landlord and Tenant—Recovery of excess rent paid —Defendant pleading that payment made under illegal contract—Two different standard rents—Maximum recoverable rent—Meaning of—Control of Rent Ordinance 1956, ss. 3, 6 & 15(b).

The plaintiff became the sub-tenant of the defendant's husband, T. C., by an agreement dated March 1, 1946 at $150.00 per month. He went into occupation and practised as an unregistered dentist. On August 1, 1951, he became the sub-tenant of the defendant and by that time he was already a registered dentist. From February 1, 1958, he paid the defendant rent at $160 per month. In July 1961 he applied for apportionment to the Rent Assessment Board which by their order dated October 21, 1961 fixed his rent at $61.47. The plaintiff brought an action to recover excess rent paid from July 1, 1956 to August 31, 1961.

The defendant contended: (1) the plaintiff obtained the sub-tenancy to practise unlawfully as an unregistered dentist and that no money paid under an illegal contract could be recovered; (2) the rent included hire of dental equipment and payment of goodwill as the shop front was previously occupied by the defendant's father who was a registered dentist; (3) there may be two standard rents for the same premises, one for the whole of the premises first let after the relevant date under the Ordinance and the other the rent first paid in respect of a part of the premises after such relevant date.

Held: (1) the agreement was irrelevant, the defendant not being a party to it. As the plaintiff was claiming for arrears paid after he became a registered dentist it cannot be argued that he was using the premises for an unlawful purposes;

(2) parties cannot contract out of the Ordinance and any agreement as regards payment of rent on a contractual tenancy in respect of controlled premises must be subject to its provisions;

(3) as the order of the Rent Assessment Board takes effect from the date it was made the maximum recoverable rent in respect of the sub-tenancy prior to the date of the order has to be worked out under the formula laid down in section 15(b) of the Ordinance.

Cases referred to:—

(1) *Alexander* v. *Rayson* [1936] 1 K.B. 169, 182.

(2) *Tan Ah Seah* v. *Teo Kai Min & Ors.* [1954] M.L.J. 50.

(3) *Hin Seng & Co.* v. *Seac Co.* [1963] M.L.J. 109.

(4) *Chong Fong Kooi* v. *Kong Gim Hem* [1959] M.L.J. 243, 244.

(5) *Ahmad & Sons* v. *Kaliappan* [1956] M.L.J. 1.

ACTION.

T. C. Tang for the plaintiff.

A. L. Hills (Miss *K. Y. Chan* with him) for the defendant.

Cur. Adv. Vult.

Gill J.: This is an action by the plaintiff, as sub-tenant of the major portion of the ground